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No. 84-1545 (6)

In The
Supreme Court of the United States
October Term, 1984

THE MILLER-WOHL COMPANY, INC.,
Appellant,

v.

COMMISSIONER OF LABOR AND INDUSTRY, STATE OF MONTANA, and TAMARA L. BULEY,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MONTANA

MOTION TO DISMISS ON BEHALF OF APPELLEE TAMARA L. BULEY, OR IN THE ALTERNATIVE, MOTION TO AFFIRM

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The Appellant's Jurisdictional Statement Contains A Number Of Factual Errors. With The Correction Of These Errors, There Is No Substantial Federal Question Presented By This Appeal.

The appeal in this case should be dismissed for the reason that it does not present a substantial federal question. The argument of Appellant in support of its jurisdictional statement is based upon a number of factual errors. When these errors are corrected, there is no substantial question presented to this Court.

The appeal of Miller-Wohl as supported by its jurisdictional statement is based upon three (3) faulty factual premises. These are:

1. That the Montana Maternity Leave Act grants a leave of absence to any pregnant employee regardless of disability. (Jurisdictional Statement, pp. 14-16).
2. That the Montana Maternity Leave Act has been found to be, or is admitted to be, preferential.
3. That Miller-Wohl's no-leave of absence policy is non-discriminatory and in compliance with Title VII of the Civil Rights Act. (Jurisdictional Statement, p. 6).

This is a case with a particular set of facts. The case must be decided upon this particular set of facts, and not upon a desired hypothetical set of facts.

Tamara Buley was hired by Miller-Wohl as a retail sales clerk at a lady's clothing store on 1 August 1979. She was hired as a regular employee in the store. Soon after her hiring, Mrs. Buley discovered that she was pregnant and promptly informed the management of her condition. Tamara Buley then experienced "morning

sickness" which caused her to leave the sales floor and be ill in the back room. On occasion, she was sent home early by her supervisor. On 27 August 1979 Miller-Wohl fired Tamara from her employment because of her pregnancy related disability.

These are the facts as they were found by the Montana Supreme Court. (Opinion, Jurisdictional Statement Appendix, pp. 4(b)-5(b)).

Appellant's Contention That The MMLA Applies To Non-Disabled Pregnant Employees Is Without Factual Basis.

The MMLA provides that an employer may not terminate a woman's employment because of her pregnancy or refuse to grant the employee a reasonable leave of absence for her pregnancy. Mont. Code Ann. Sec. 40-2-311 (1) (2). Miller-Wohl argues that because the protections afforded in the MMLA are not limited to workers who are disabled by pregnancy, then the statute could be construed to grant preferential treatment to non-disabled pregnant employees to the disadvantage of other non-disabled employees.

It must be stressed in this case, however, that Tamara Buley was disabled; she was disabled because of her pregnancy; and she was fired because of her pregnancy related disability. This is not a case where any "preference" was granted to a non-disabled pregnant employee.

Miller-Wohl raised the same argument before the Montana Supreme Court. This argument was rejected by the Montana Court when it stated:

> Miller-Wohl contends that the Federal law requires equal employment policy only when the pregnant employee is disabled and therefore the state law is in conflict with the Federal law.
>
> We reject Miller-Wohl's arguments on these points. Miller-Wohl is arguing on a statement of facts that are not before this court, and were not before the District Court nor the Commission. We are not considering in this case a non-disabled pregnant employee. Tamara Buley was disabled by virtue of her pregnancy, and eventually was discharged for that disability.

Appendix 23(b).

Miller-Wohl has not directed this Court to any decision by any Montana Court or enforcement agency which has construed the MMLA in the manner urged here by Miller-Wohl. No Montana Court or enforcement agency has ever extended the protection afforded by the MMLA to a non-disabled pregnant woman. This Court must accept the Montana Court's construction of a Montana Statute. *Cramp v. Board of Public Instruction of Orange County, Florida*, 368 U.S. 278 (1961).

Miller-Wohl is attempting to establish that a substantial Federal question exists upon a set of facts which has never occurred and upon an application of the statute which has never been made. This is simply not allowed. *Alabama State Federation of Labor v. McAdory, Alabama*, 325 U.S. 450 (1945).

The MMLA Has Never Been Found To Be Or Admitted To Be Preferential.

Miller-Wohl states throughout its jurisdictional statement that the Montana Maternity Leave Act is "prefer-

ential", and even states that the statute is "admittedly preferential". (Jurisdictional Statement, p. 19). Miller-Wohl, however, does not identify what the supposed preference is. It appears that Miller-Wohl contends that the statute is preferential because the MMLA does not specifically state that its protections are based upon the pregnant employee's ability or inability to work. Therefore, argues Miller-Wohl, the MMLA grants an illegal benefit or preference to pregnant workers not enjoyed by other non-disabled workers.

First, as previously argued, this argument is based on hypothetical facts not before this Court and upon an imaginary construction and application of the statute. This Court has held that it will not decide constitutional issues upon a hypothetical construction of a statute. *Asbury Hospital v. Cass County, North Dakota*, 326 U.S. 207 (1945).

Secondly, the Montana Supreme Court dealt with this issue in holding that no preference is granted by the MMLA. (Appendix 24(b)). The Montana Court held that since an employer may not legally discharge an employee because of her pregnancy related disability, the MMLA places men and women on more equal terms. *Id.* This is because both male and female workers may be treated identically if they are disabled for any reason other than pregnancy, but the employer may not burden the female employees in such a way as to deprive them of employment opportunities because of their different reproductive role. *Id.*

Tamara Buley was fired because she was temporarily disabled by her pregnancy. If she had been a man, she

would not have been fired because she would not have been pregnant. Mrs. Buley was not granted a preference by enforcement of the MMLA. (Montana Supreme Court Opinion, App. 18(b)-19(b)). She was only granted the ability to work on the same basis as those who are not effected by the sex specific disability of pregnancy.

Miller-Wohl's contention that the MMLA in this case is "preferential" is not borne out by the facts or the law.

Miller-Wohl's No-Leave Policy Has Never Been Determined To Be Non-Discriminatory.

Miller-Wohl gives the impression in its Statement of the Case that its no leave of absence policy has been found by the Montana Human Rights Commission (MHRC) to be non-discriminatory. Miller-Wohl apparently bases this contention upon the fact that after an informal hearing, an investigator for the MHRC found that from the evidence then available, there was not reasonable cause to believe that Miller-Wohl had violated the Montana Human Rights Act or Title VII. Miller-Wohl also points out that the EEOC Complaint and the Complaint before the Montana Human Rights Commission were subsequently dismissed. Neither of these actions, however, give rise to an inference that Miller-Wohl's no-leave policy and termination of Mrs. Buley were non-discriminatory.

At the time Mrs. Buley filed her original Complaint before the Montana Human Rights Commission, jurisdiction for enforcement of the MMLA laid with the Commissioner of Labor and Industry. Since the MHRC had no jurisdiction over the MMLA, Mrs. Buley voluntarily dis-

missed the charges before the MHRC and EEOC and chose to pursue her remedies under the MMLA.

The reasonable cause finding referred to by Miller-Wohl was only made in the course of an informal investigation of the case by the MHRC. No evidence was ever presented to the Commission, nor did either party have the right to subpoena, examine, or cross-examine witnesses. Mont. Code Ann. Sec. 49-2-504. Only after a contested hearing is held before the Commission, can a finding be made that a practice was either discriminatory or not discriminatory. Mont. Code Ann. Sec. 49-2-505 through Sec. 49-2-507. Only the Commission itself may issue a finding as whether or not a policy is discriminatory, not an investigator from an informal investigation. *Id.*

Any intimation by Miller-Wohl that its no-leave policy has been found to be non-discriminatory is not supported by the facts or the law of this case. The importance of this fact is that before Miller-Wohl can contend that the MMLA is preempted by Title VII, it must show that it acted in conformance with Title VII and that the MMLA presents an insurmountable barrier to its compliance with Federal law. Since Miller-Wohl's actions have not been found to be non-discriminatory and since the Montana Supreme Court has held that both Miller-Wohl's firing of Mrs. Buley and Miller-Wohl's no leave policy are probably discriminatory under Title VII, as well as the MMLA, there can be no conflict of laws.

The Ruling Of The Montana Supreme Court Should Be Affirmed Without Further Argument For The Reason That Federal Statute And Case Law Foreclose Any Substantial Question Being Presented.

Miller-Wohl contends that its no-leave of absence policy is lawful under Title VII and therefore it cannot be compelled to change its policy to be in compliance with the MMLA. Miller-Wohl, however, does not contend that its firing of Mrs. Buley because of her pregnancy was lawful under Title VII. The firing of someone because of her pregnancy is clearly unlawful under Federal statute:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's . . . sex . . .

42 U.S.C. Sec 2000e-2.

The term "because of sex" is defined in Section 701 (k) of Title VII, the Pregnancy Discrimination Amendment as:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions;

The firing of a worker because of pregnancy is also unlawful under Section 1 of the Montana Maternity Leave Act:

> It shall be unlawful for an employer or its agent to:
>
> (1) terminate a woman's employment because of her pregnancy.

Although Miller-Wohl contends that the validity of the MMLA should be construed in light of Miller-Wohl's

facially neutral no-leave of absence policy, the real question presented by this case is whether the State of Montana may prohibit the firing of workers because of pregnancy. The Montana Supreme Court recognized this distinction when it stated that rather than the validity of Miller-Wohl's facially neutral no-leave policy being in question, the fact that Mrs. Buley was fired because of her pregnancy was the real issue before the Court. (Appendix 18(b)). The Montana Court then held that firing a worker such as Mrs. Buley because of her pregnancy is an unlawful practice, both under Title VII and the MMLA.

Although Miller-Wohl contends that it is on the "horns of a dilemma" and that this Court should resolve that dilemma, there simply is no conflict. Since both Title VII and the MMLA prohibit the firing of employees because of pregnancy (which is what happened here), there is no inconsistency between the statutes and there is nothing for this Court to decide.

Since The PDA Is A Definitional Statute, Not A Proscriptive Statute, There Can Be No Conflict Between The PDA And The MMLA.

Miller-Wohl argues that the MMLA is preempted by the Pregnancy Discrimination Amendment of Title VII, 42 U.S.C. 2000e (k) (Jurisdictional Statement, pp. 9-11). Miller-Wohl contends that the PDA commands that all employees be treated the same under all employment policies. Therefore, argues Miller-Wohl, since it did not grant leave to any employee for any disability in their first year of employment, under the PDA it should not have to grant leave to any woman for a pregnancy related disability.

The flaw in this argument, though, is that the PDA is only a definitional statute. It does not proscribe any acts, nor does it confer any rights. The PDA merely defines what Congress meant by the phrase "because of sex" contained in the proscriptive statute of 42 U.S.C. 2000e-2.

This distinction was recognized by this Court in the case of *Newport News Ship Building in Dry Dock v. EEOC*, 462 U.S. 669, 77 L.Ed.2d 89, 99 (1983). Quite simply, it is impossible for the MMLA to be in violation of a statute which merely defines what is meant by the terms "because of sex" or "on the basis of sex".

Further, this Court held that the PDA defines the terms "because of sex" and "on the basis of sex" in two separate clauses. 77 L.Ed.2d at 99, note 14. The first clause states that "because of sex" includes on the basis of pregnancy, childbirth, or related medical conditions. 77 L.Ed.2d at 99. When this clause is read together with the proscriptive statute, 42 U.S.C. Sec. 2000e-2, Title VII prohibits discriminatory acts as follows:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual . . . because of such individual . . . (pregnancy, childbirth, or related medical conditions) (sex).

This prohibition is almost word for word the same as the prohibition contained in the MMLA. Therefore, there can be no conflict and there is no substantial question raised by this appeal.

———o———

CONCLUSION

Appellee Tamara L. Buley respectfully requests the Court to dismiss the Appeal, or in the alternative, affirm the decision of the Montana Supreme Court without further argument.

DATED this 25th day of April, 1985.

Respectfully submitted,

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